The Chapeau: Stringent Threshold or Good Faith Requirement

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The international trading order has lately come under increased pressure: the Comprehensive Economic and Trade Agreement (CETA) struggles to pass ratification; the Regional Comprehensive Economic Partnership (RCEP) negotiations are stalled; and the Trans-Pacific Partnership (TPP) has been downsized. The overarching issue is to find the right balance between trade liberalization, on the one hand, and non-trade values, on the other hand. Critics of the current system point out that the law as it stands emphasizes excessive trade liberalization to the detriment of the regulatory autonomy of national lawmakers. The author submits that the key clause affecting the entire system is the introductory clause of the general exceptions: the chapeau. This clause also features in free trade agreements (FTAs) and international investment agreements, as it is common practice to draw on the language of the WTO Agreement. The interpretative conflict pivots around two extremes: On one end of the spectrum, the chapeau is read as a stringent threshold requirement, thus reducing the policy space of states to regulate public welfare matters. On the other end, the chapeau reaffirms the tenet of good faith, which guides the performance of every treaty in any event. The author argues that the meaning of the chapeau should be clarified by negotiators in future FTAs, such as RCEP, with a view to curtailing its restrictive clout while maintaining its potential to promote good governance, notably administrative due process, and advances a concrete proposal to this effect.

1 INTRODUCTION

The international trading order has lately come under increased pressure: The Comprehensive Economic and Trade Agreement (CETA)[1] struggles to pass ratification in the European Union; the negotiations for a Regional Comprehensive Economic Partnership (RCEP) are stalled; and the United States withdrew from the Trans-Pacific Partnership (TPP) as a result of which the remaining signatories rebranded the agreement as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and agreed to suspend certain provisions, particularly in relation to the protection of foreign

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1 Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 Oct. 2016).

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investment and intellectual property.[2] As always, the overarching issue is to find the right balance between trade liberalization, on the one hand, and non-trade values, on the other hand. Critics of the current system point out that the law as it stands emphasizes excessive trade liberalization to the detriment of the regulatory autonomy of national lawmakers. Instead of promoting world peace, liberalization is even seen as a threat to democratic processes.[3]

The author submits that the key clause of the entire system is the introductory clause of the general exceptions: the so-called chapeau. Exceptions are the stage of the legal analysis when the conflict of competing societal interests comes to a head, and the chapeau is the final hurdle a government measure must clear before it is found WTO-compliant. The chapeau thus fine-tunes the delicate balance between domestic policy space and the Members' obligations.

The clause is not only of relevance to the WTO Agreement,[4] but also resurfaces in free trade agreements (FTAs), as it is common practice to model FTA general exceptions on the ones contained in the WTO Agreement. Rules of interpretation, such as Article 29.17, second sentence, CETA or Article 28.12.3, second sentence, TPP, ensure that the exceptions in those agreements are interpreted in line with WTO case law. Besides, the use of chapeau language is not limited to general exceptions. For instance, the Treaty of Waitangi exception in the CPTPP contains a chapeau-like clause.[5] Furthermore, states increasingly use general exceptions, including chapeau language, in investment chapters[6] and bilateral investment treaties (BITs).[7] So the risk is that problems are imported from the trade arena into the investment arena.

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2 For a list of the suspended provisions, *see* New Zealand Foreign Affairs & Trade, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/cptpp-2/ (accessed 12 Feb. 2018).

3 *See* e.g. International Trade Union Confederation, *Statement on the Trans-Pacific Partnership Agreement (TPP)* 2 (Press Release, 2 Feb. 2016), https://www.ituc-csi.org/statement-on-the-trans-pacific?lang=en (accessed 12 Feb. 2018).

4 Marrakesh Agreement establishing the World Trade Organization (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1867 UNTS 154 (WTO Agreement).

5 Art. 29.6.1 TPP.

6 *See* e.g. Art. 14.15 of the Japan–Australia Economic Partnership Agreement (entered into force 15 Jan. 2015); Art. 9.8.1 of the Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China (entered into force 20 Dec. 2015); Art. 9.3.3 of the Free Trade Agreement Between the European Union and the Republic of Singapore; Art. 28.3.2 CETA.

7 *See* e.g. Art. 16(1) of the Brazil Model BIT 2015; Art. 5(2) of the Azerbaijan Model BIT 2016; Art. 17(1) of the Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (entered into force 6 Sept. 2016); Art. 17(1) of the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (entered into force 9 Dec. 2013); Art. 14(2) of the Agreement between the Government of the Republic of Finland and the Government of the Republic of Zambia on the Promotion and Protection of Investments (signed 7 Sept. 2005).

The chapeau is rife with ambiguity, which has been lamented since the first case was brought before the World Trade Organization.[8] The interpretative conflict revolves around two extremes: On one end of the spectrum, the chapeau is read as a stringent threshold requirement, thus reducing the policy space of states to regulate public welfare matters. On the other end, the chapeau reaffirms the tenet of good faith, which guides the performance of every treaty in any event.[9] It is worth calling to mind that only in one case did a respondent ever succeed by invoking a general exception, to wit: in *US – Shrimp (Article 21.5 – Malaysia)*.[10] In many cases, the respondents' defence foundered on the chapeau.[11] So it is high time to address the ambiguity of the chapeau and to elaborate workable definitions.

The author argues that negotiators of FTAs, instead of blindly incorporating WTO language, should rather take the opportunity to clarify the meaning of the chapeau in light of new WTO jurisprudence. Negotiators are naturally hesitant to tinker with well-established General Agreement on Tariffs and Trade (GATT) language, unless there is a cogent reason.[12] As far as the chapeau is concerned, this is the case. In the author's view, the chapeau constitutes a good faith caveat foreclosing arbitrary rule-making, not a stringent threshold requirement. Lorand Bartels recently put forward a proposal to reconstruct the chapeau.[13] The present article seeks to carry the discussion forward and espouses a middle course somewhat between the approach taken by the Appellate Body and Bartels' proposal. The author makes a case that 'discrimination' and 'restriction' in the chapeau refer to the respective substantive obligations (prohibition of discrimination and market access), making 'arbitrary', 'unjustifiable' and 'disguised' the operative words. The terms 'discrimination' and 'restriction' in the chapeau connect the general exceptions to the concept of trade barriers, namely discriminatory and/or restrictive measures. 'Restriction' is the broader concept and encompasses 'discrimination'.[14] The author

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8 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996, at 23.

9 Art. 26 of the Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 Jan. 1980) 1155 UNTS 331 (VCLT). *See* Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 5 Nov. 2001, para. 81, affirming that good faith 'underlies all treaties'.

10 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, 21 Nov. 2001, para. 152. In the *EC – Asbestos* case, already the infringement (of Art. III:4 GATT) was negated by the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R, 5 Apr. 2001, paras 132, 148.

11 For an overview, *see* Niall Moran, *The First Twenty Cases Under GATT Article XX: Tuna or Shrimp Dear?*, in *International Economic Law: Contemporary Issues* 10, 13 (Giovanna Adinolfi & others eds, Springer 2017).

12 Cf. David Collins, *The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration Through the Application of the WTO's General Exceptions*, 32 Arb. Int'l 575, 581 f (2016).

13 Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 Am. J. Int'l. L. 95 (2015).

14 Appellate Body Report, *US – Gasoline*, at 25.

further pleads that the pivotal element of the chapeau is an arbitrariness test and contends that its other elements, 'unjustifiable' and 'disguised', can either be subsumed thereunder or have not proven relevant in practice.

Section 2 explicates the ratio legis of the chapeau, before section 3 parses its elements. In particular, section 3 elaborates an arbitrariness test that is accommodating of other rules of international law. Section 4 answers the question in which order those elements should be analysed, and section 5 deals with the burden of proof. In section 3–5 the article also critiques the most recent application of the chapeau in *Indonesia – Import Licensing Regimes*.[15] It illustrates the current state of affairs. Sections 6 and 7 then explore the potential the chapeau has to ensure administrative due process and good governance in the Members. Section 8 appraises ideas to curtail its clout and suggests to rework its wording for use in FTAs under negotiation, such as RCEP. Section 9 finally concludes and advances a concrete proposal to this effect which draws on European Union law. The aim is not to replace the chapeau, but to phrase it more precisely.

2 RATIO LEGIS OF THE CHAPEAU

2.1 *SCHRANKEN-SCHRANKE*

For a government measure to pass muster under a general exception, be it Article XX of the GATT[16] or Article XIV of the General Agreement on Trade in Services (GATS),[17] it must come under one of the listed grounds of justification as well as satisfy the requirements of the chapeau.[18] Systematically, the chapeau constitutes a limitation on a limitation, a *Schranken-Schranke*, just like the necessity test, because it attaches conditions to the Members' right to regulate as guaranteed in the exceptions ('a *limited and conditional* exception').[19] In doing so, it serves to limit the 'trade distortive effects' of an otherwise legitimate measure.[20]

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15 Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, 22 Nov.. 2017.

16 General Agreement on Tariffs and Trade 1994 (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1867 UNTS 187.

17 General Agreement on Trade in Services (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1869 UNTS 183.

18 Appellate Body Report, *US – Gasoline*, at 22.

19 Cf. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 Nov. 1998, para. 157 (emphasis in original).

20 Padideh Ala'i, *Transparency and the Expansion of the WTO Mandate*, 26 Am. U. Int'l L. Rev. 1009, 1025 (2011).

2.2 Abuse of rights

According to the Appellate Body, the application of the chapeau is guided by the tenet of abuse of rights, which emanates from the principle of good faith.[21] Exceptions (and the ensuing policy space) must not be misused by the Members for protectionist purposes. Following this, and in light of the history of the clause,[22] which may be taken into account as a supplementary means of interpretation,[23] the ratio legis of the chapeau is to sift out protectionism in the guise of public welfare measures.[24] In the words of the Appellate Body: 'The task of interpreting and applying the chapeau is … the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions'[25]

The Treaty on the Functioning of the European Union (TFEU) also provides for a two-tier test under its general exceptions and uses similar language.[26] In the same vein, the pertinent Articles 36, second sentence, and 65(3) TFEU establish a prohibition of abuse of the rights of EU Member States in the enumerated policy fields for the benefit of fundamental freedoms.[27] It bears noting, however, that the whole WTO system is geared towards restraining protectionism. The chapeau is just another hoop that a government measure would have to jump through. So it is questionable whether the above finding assists in the interpretive process, given that the performance of the entire WTO Agreement must be governed by good faith. The dictum of the Appellate Body is not only true of the chapeau.[28] By the same token, an arbitral tribunal held that 'every rule of law includes an implied clause that it should not be abused'.[29] The proposition that the chapeau embodies *abus de droit* does not tell us how to flesh out its elements. This will occupy our attention

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21 Appellate Body Report, *US – Gasoline*, at 22, 25; Appellate Body Report, *US – Shrimp*, para. 158; Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.95. *See also* Charles Kotuby Jr. & Luke Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* 107–113 (OUP 2017).

22 For a brief history of the chapeau, *see* Ala'i, *supra* n. 20, at 1022–1027.

23 Art. 3.2.2 of the Dispute Settlement Understanding (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1869 UNTS 401 (DSU) in conjunction with Art. 32 VCLT.

24 Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, 48 Geo. Wash. Intl L. Rev. 81, 87, 118–120 (2015).

25 Appellate Body Report, *US – Shrimp*, para. 159.

26 Treaty on the Functioning of the European Union (signed 13 Dec. 2007, entered into force 1 Dec. 2009) [2008] OJ C115/47.

27 Peter-Christian Müller-Graff, *Artikel 36 AEUV*, in *Europäisches Unionsrecht* para. 160 (Hans von der Groeben, Jürgen Schwarze & Armin Hatje eds, 7 ed., Nomos 2015); Karl-Philipp Wojcik, *Artikel 65 AEUV*, in *Europäisches Unionsrecht* para. 28 (Hans von der Groeben, Jürgen Schwarze & Armin Hatje eds, 7th ed., Nomos 2015).

28 *See also* Bartels, *supra* n. 13, at 102–104.

29 *Phoenix Action v. Czech Republic* (ICSID Case No. ARB/06/5) (Award, 15 Apr. 2009), para. 107.

hereinafter. But regardless of its exact scope, the chapeau contains the political message that arbitrary and disguised restrictions are not tolerated.

3 ELEMENTS OF THE CHAPEAU

The legal text of the chapeau has three components: (1) arbitrary or (2) unjustifiable discrimination between countries where like/the same conditions prevail, or (3) a disguised restriction on international trade.[30] It should be borne in mind at the outset that trade effects, i.e. volumes of imports and exports, are immaterial.[31] The panel in *US – Gambling* examined all three components together.[32] Lo criticizes such an approach and promotes instead a distinct scope of application for the various elements of the chapeau.[33] The author argues that the criteria 'arbitrary or unjustifiable discrimination' can be conflated to one single test, as was recently done by the panel in *Indonesia – Import Licensing Regimes*.[34] Moreover, the author makes the case that, firstly, the concept of 'restriction' embraces the concept of 'discrimination', and secondly, that both elements do not add anything to the finding of an infringement. As a result, the adjectives 'arbitrary' and 'disguised' are the operative words and apply to both trade-restrictive and discriminatory measures. Besides, the reference to discrimination in the chapeau could be expunged without altering its scope.

3.1 Discrimination

In *US – Shrimp*, the Appellate Body took the view that:

> in order for a measure to be applied in a manner which constitutes 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', three elements must exist: First, the application of the measure must result in *discrimination* … Second, the discrimination must be *arbitrary* or *unjustifiable* in character … Third, this discrimination must occur *between countries where the same conditions prevail*.[35]

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30 Appellate Body Report, *US – Gasoline*, at 23; Appellate Body Report, *US – Shrimp*, para. 150. Art. XIV GATS refers to 'like conditions' instead of 'the same conditions'. When this article refers to the latter in the following, this also includes the former.

31 Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 17 Dec. 2007, para. 229.

32 Panel Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285/R, 20 Apr. 2005, para. 6.608, upheld by the Appellate Body, paras 348–351.

33 Chang-Fa Lo, *The Proper Interpretation of 'Disguised Restriction on International Trade' Under the WTO: The Need to Look at the Protective Effect* J.I.D.s. 111, 122–125 (2012).

34 Panel Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/R, WT/DS478/R, modified by WT/DS477/R/Corr.1, WT/DS478/R/Corr.1, 22 Dec. 2016, para. 7.565. This aspect was not under appeal.

35 Appellate Body Report, *US – Shrimp*, para. 150 (emphasis in original).

The Appellate Body further noted that 'discrimination' within the meaning of the chapeau differs from the most-favoured nation (MFN) and national treatment obligations.[36]

3.1[a] *Between Countries Where the Same Conditions Prevail*

The Appellate Body observed in *US – Shrimp* that 'discrimination results not only when countries in which the same conditions prevail are differently treated';[37] discrimination may also occur 'when the same measure is applied to countries where different conditions prevail'.[38] Reading the legal text, one might think that, with respect to the substantive obligations, the comparison is between products ('the like product') whereas, as far as the chapeau is concerned, the comparison is between countries.[39] In fact, what is being compared is not the conditions prevailing in different countries but the competitive relationships of products.[40] The panel in *Indonesia – Import Licensing Regimes* recalled that the 'measures affect the competitive opportunities of importers and imported goods' and concluded that 'this shows that there is discrimination between domestic and imported goods in the sense of that prohibited by the *chapeau* of Article XX'.[41] Davies remarks that 'If the products are "like", this can be a sufficient basis for finding that prevailing conditions between countries are the same.'[42] In both cases the discrimination is grounded on nationality: the origin of the product.[43] In a nutshell, the same conditions prevail when the products originating from the complainant(s) and the respondent compete in the same market.[44] The element of 'between countries where the same conditions prevail' embodies what is a precondition for any claim of discrimination, namely comparability: one can only find discrimination between two situations if they are comparable.[45] The European Court of Justice, for instance, defines the principle of

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36 *Ibid*.
37 *Ibid*., para. 165.
38 Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* 596 (4th ed., CUP 2017); Patrick Low, Gabrielle Marceau & Julia Reinaud, *The Interface between the Trade and Climate Change Regimes: Scoping the Issues*, 46 J. World Trade 485, 510, 515 (2012); Appellate Body Report, *US – Shrimp*, para. 177.
39 In this sense, Joost Pauwelyn, Andrew Guzman & Jennifer Hillman, *International Trade Law* 440 (3rd ed., Wolters Kluwer 2016).
40 Bartels, *supra* n. 13, at 110 f, 124.
41 Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.813 (not appealed).
42 Arwel Davies, *Interpreting the Chapeau of GATT Article XX in Light of the 'New' Approach in Brazil-Tyres*, 43 J. World Trade 507, 513 (2009).
43 *See ibid*., at 509.
44 *See* Bartels, *supra* n. 13, at 110.
45 Cf. Mitsuo Matsushita & others, *The World Trade Organization: Law, Practice, and Policy* 620 (3rd ed., OUP 2015).

non-discrimination in the following terms: 'comparable situations must not be treated differently and … different situations must not be treated in the same way'.[46]

3.1[b] *Relationship to Substantive Obligations*

According to its own wording, a measure may still pass the chapeau test, even if found discriminatory under the chapeau, provided the discrimination is neither arbitrary nor unjustifiable.[47] Conversely, if a measure is considered arbitrary (or unjustifiable), it does not matter whether it is also discriminatory. The measure would founder on the chapeau in any event. As highlighted by Gaines with respect to the *US – Shrimp* ruling, 'Those who received certification were, after all, subject to the same non-transparent process as the others.'[48] Van den Bossche and Zdouc underline that 'the chapeau … does not prohibit discrimination *per se*, but rather *arbitrary* and *unjustifiable* discrimination'.[49] Ergo, the crucial question is if the measure is applied in an arbitrary/unjustifiable manner. We will see later that this entails the requirement of the uniform administration of the measure at issue. As a side note, in investment law, the prohibition of 'arbitrary or discriminatory measures' often belongs to one single standard.[50]

One way to read the chapeau would be to relate the discrimination test to the corresponding substantive provisions. As a corollary, 'discrimination' within the chapeau would have the same meaning as in the combined MFN and national treatment obligations.[51] Hence, the test applied to a national treatment/MFN violation would be if the discrimination was 'arbitrary' (or 'unjustifiable' for that matter). This raises the question of whether such a reading would be at odds with the interpretive principle of effectiveness, as suggested by the Appellate Body: 'The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred.'[52] To criticize the above result on the basis of *effet utile* is the same as criticizing that the words 'international

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46 Case C-148/02, *Carlos Garcia Avello v. Belgian State* [2003] ECR I-11613, para. 31, regarding Art. 18 TFEU.

47 Bartels, *supra* n. 13, at 97.

48 Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. Pa. J. Int'l Econ. L. 739, 824 (2001).

49 Van den Bossche & Zdouc, *supra* n. 38, at 595 (emphasis in original). In the same vein, Bartels, *supra* n. 13, at 115 f.

50 Jeswald W. Salacuse, *The Law of Investment Treaties* 263 (2d ed., OUP 2015); Jarrod Hepburn, *Domestic Law in International Investment Arbitration* 31 (OUP 2017). *See* e.g. Art. 2(3) of the German Model BIT (2008).

51 Arts I, III GATT, Arts II, XVII GATS.

52 Appellate Body Report, *US – Gasoline*, at 23, confirmed in Appellate Body Report, *US – Shrimp*, para. 150.

trade' in the chapeau are not given sufficient meaning. As pointed out by Bartels, there is no issue if 'discrimination' is read together with the attributive adjectives, for these distinguish the chapeau from the infringement analysis.[53] Whether 'discrimination' within the chapeau has an independent scope (separate from the found infringement) depends on how the measure at issue is being delineated. In *Brazil – Retreaded Tyres*, were the court injunctions allowing the importation of used tyres part of the import ban (in the form of an exception to the ban) or a separate measure violating the national treatment obligation?[54] The Appellate Body assumed the former.[55]

In this connection, it is worth noting that the Appellate Body in *EC – Seal Products* equated the substantive test with the non-discrimination test in the chapeau. The Appellate Body stated in that case that 'the causes of the "discrimination" found to exist under Article I:1 of the GATT 1994 are the same as those to be examined under the chapeau', and then turned to the question of 'whether such discrimination is "arbitrary or unjustifiable" within the meaning of the chapeau'.[56] The Appellate Body also clarified that the same is not true of Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement):[57] 'the Panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement'.[58] Because the TBT Agreement does not have a general exception provision along the lines of Article XX GATT, the legal analysis has to be structured differently thereunder.[59] Conversely, according to the Appellate Body in *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, a violation of the chapeau is tantamount to a finding of uneven-handedness under Article 2.1 TBT Agreement, and would thus amount to 'treatment no less favourable': 'a measure that involves "arbitrary or unjustifiable discrimination" would not be designed and applied in an "even-handed manner"'.[60]

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53 Bartels, *supra* n. 13, at 110, 120.

54 On this issue *see* Davies, *supra* n. 42, at 534.

55 Appellate Body Report, *Brazil – Retreaded Tyres*, paras 240–252.

56 Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 18 Jun. 2014, para. 5.318.

57 WTO Agreement on Technical Barriers to Trade (signed 15 Apr. 1994, entered into force 1 Jan. 1995) 1868 UNTS 120.

58 Appellate Body Report, *EC – Seal Products*, para. 5.313.

59 For a discussion of Art. 2.1 TBT Agreement, in particular the even-handedness test, *see* Gracia Marín Durán, *Measures with Multiple Competing Purposes After EC – Seal Products: Avoiding a Conflict Between GATT Article XX-Chapeau and Article 2.1 TBT Agreement*, 19 J. Int'l Econ. L. 467, 482–489 (2016).

60 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW, 3 Dec. 2015, para. 7.31.

In the final analysis, the principle of effectiveness is heeded because the expression 'arbitrary or unjustifiable discrimination' as a whole is given meaning and effect. That is all that a proper reading of effectiveness demands.[61]

3.2 Unjustifiable

The Appellate Body assumed an unjustifiable discrimination in *US – Shrimp* because the respondent negotiated a plurilateral solution with some Members, but not the complainants.[62] Another example of unjustifiable discrimination is given when a Member imposes differing transition periods on exporters from other Members to comply with a new domestic rule.[63] That said, every state conduct falling under the heading 'unjustifiable' can be subsumed under an arbitrariness test. It seems artificial to distinguish between 'arbitrary' and 'unjustifiable'; both concepts can be conflated.[64] Neither in *Brazil – Retreaded Tyres*[65] nor in *EC – Seal Products*[66] did the Appellate Body actually differentiate between the two.

As early as in *US – Gasoline* did the Appellate Body acknowledge that the requirements of the chapeau 'may, accordingly, be read side-by-side; they impart meaning to one another'.[67] The Appellate Body observed in *Brazil – Retreaded Tyres* that 'Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination.'[68] That is, the same criteria apply. Whether a particular measure is unjustifiable is the crux of any exception. Davies stresses that 'the chapeau is designed to uncover country-based discrimination, which, by definition, is "unjustifiable"'.[69] The word 'unjustifiable' could and should, therefore, be omitted from FTA exceptions. Incidentally, the terms 'arbitrary', 'unjustified' and 'unreasonable' are used interchangeably in international investment agreements.[70] In sum, the test under the chapeau is one of arbitrariness. We will turn to this element next.

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61 *See* Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 12 Jan. 2000, para. 81: 'a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously' (emphasis in original).

62 Appellate Body Report, *US – Shrimp*, para. 172. *See also* Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras 122 f.

63 Appellate Body Report, *US – Shrimp*, paras 173 f.

64 *Pro* Davies, *supra* n. 42, at 522, 538. *See also* Bartels, *supra* n. 13, at 121, 123.

65 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 232.

66 Appellate Body Report, *EC – Seal Products*, para. 5.328.

67 Appellate Body Report, *US – Gasoline*, at 25. *See also* Michael Trebilcock, Robert Howse & Antonia Eliason, *The Regulation of International Trade* 670 (4th ed., Routledge 2013).

68 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225.

69 Davies, *supra* n. 42, at 538.

70 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 191 (2d ed., OUP 2012).

3.3 Arbitrary

3.3[a] *Definition*

To be operational, the concept of arbitrariness must be fleshed out. In short, 'arbitrary' purports that no reasonable explanation can be given for the measure. This follows from the dictionary meaning of the term, inferences drawn from other WTO provisions, as well as a comparison with EU and investment law. *Black's Law Dictionary* defines 'arbitrary' as follows: '1. Depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact.'[71] Trebilcock, Howse and Eliason call measures arbitrary that are 'patently unreasonable'.[72] The term 'reasonable', in turn, appears in Article X:3(a) GATT. The panel in *Dominican Republic – Import and Sales of Cigarettes* defined that term as meaning 'in accordance with reason, not irrational or absurd, proportionate, having sound judgement'.[73] As will be seen hereinafter, the Appellate Body harnesses the requirements of Article X:3(a) GATT to concretize the chapeau in light of the fact that the concepts of arbitrariness and reasonableness overlap. The Appellate Body held that 'whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised … *reasonably*"';[74] furthermore, 'the measures falling within the particular exceptions must be applied *reasonably*'.[75]

For instance, pursuant to Article VI:4(a) GATS, 'measures relating to qualification requirements and procedures, technical standards and licensing requirements' are to be '*based on objective and transparent criteria*, such as competence and the ability to supply the service'.[76] Likewise, in European Union law, a measure is considered arbitrary if no objective reasons can be given for it or there are no reasons at all.[77] In this context, it is also worth looking at arbitral decisions with a view to comparing how those forums have tackled the concept of arbitrariness,[78] mindful that remedies in international

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71 Bryan A. Garner, *Black's Law Dictionary* (10th ed., Thomson Reuters Westlaw 2014).

72 Trebilcock, Howse & Eliason, *supra* n. 67, at 690.

73 Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, 19 May 2005, para. 7.385.

74 Appellate Body Report, *US – Shrimp*, para. 158 (emphasis added).

75 Appellate Body Report, *US – Gasoline*, at 22 (emphasis added).

76 Emphasis added.

77 Müller-Graff, *supra* n. 27, paras 166 f; Wojcik, *supra* n. 27, para. 30; Jürgen Bröhmer, *Art. 65 AEUV*, in *EUV/AEUV* para. 52 (Christian Calliess & Matthias Ruffert eds, 5th ed., C.H. Beck 2016).

78 For this comparative approach in general, *see* Andrew Mitchell, Elizabeth Sheargold & Tania Voon, *Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment*, 17 J.W.I.T. 7, 44 f (2016).

investment law are retrospective[79] and that the complainant is a private entity. International investment law provides for protection from arbitrary policies, too, either under the fair and equitable treatment standard or as an idiosyncratic treaty standard.[80] One arbitral tribunal saw arbitrary conduct given when the respondent did not engage 'in a rational decision-making process'.[81] Another held that, under the heading of arbitrariness, 'The sole inquiry … is whether or not there was a manifest lack of reasons for the legislation.'[82] Hence, pronouncements of arbitral tribunals seem to confirm that arbitrariness segues into the concept of reasonableness. The tribunal in *National Grid v. Argentina* explicitly stated so: 'the plain meaning of the terms "unreasonable" and "arbitrary" is substantially the same'.[83]

Over the years, case law has developed particular categories of state conduct deemed to be arbitrary. We will examine those momentarily, as they provide guidance to treaty interpreters.

3.3[b] *Examples*

3.3[b][i] No Due Regard for Other Members' Interests

The chapeau forces Members to have due regard to foreign interests when adopting or enforcing a government measure.[84] Two examples illustrate this: *US – Shrimp* and *EC – Seal Products*. In both cases the respondent did not take sufficient account of the interests of the complainants: harvesting interests in the former, indigenous interests in the latter. As a result, the Appellate Body found arbitrariness.[85] This duty to have due regard to foreign interests does not go so far, however, as to impel states to negotiate a multilateral solution.[86]

Investment law corroborates that. According to the arbitral tribunal in *LG&E v. Argentina*, a rational decision-making process 'would include *a consideration of the effect of a measure on foreign* investments and a balance of the interests of the State with any burden

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79 Art. 36 UN ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, GAOR 56th Session Supp. 10, 43 (2001).

80 Salacuse, *supra* n. 50, at 261–263; Dolzer & Schreuer, *supra* n. 70, at 194 f.

81 *LG&E v. Argentina* (ICSID Case No. ARB/02/1) (Decision on Liability, 3 Oct. 2006), para. 158.

82 *Glamis Gold v. USA* (Award, 8 Jun. 2009), para. 805, confirmed in *Philip Morris v. Uruguay* (ICSID Case No. ARB/10/7) (Award, 8 Jul. 2016), para. 399.

83 *National Grid v. Argentina* (Award, 3 Nov. 2008), para. 197.

84 Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 German L. J. 1175, 1197, 1199 (2011).

85 Appellate Body Report, *US – Shrimp*, para. 177; Appellate Body Report, *EC – Seal Products*, para. 5.337.

86 Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 123.

imposed on such investments'.[87] *Pope & Talbot v. Canada* would be another pertinent example from investment law.[88]

3.3[b][ii] No Due Regard to Relevant Facts

The *US – Shrimp* case would fall into this category. The arbitrariness test compels a Member to recognize comparably effective measures taken by other Members to achieve the same public welfare objective.[89] It should be noted that comparable effectiveness is less than identical effectiveness. Another case in point is *Dominican Republic – Import and Sale of Cigarettes*. There the panel criticized the respondent for disregarding the 'retail selling prices of imported cigarettes' when determining 'the tax base for the application of the tax on cigarettes'.[90]

3.3[b][iii] Bad Faith

Moreover, discrimination is arbitrary if done deliberately. The Appellate Body stated – under the heading of unjustifiable discrimination – that 'The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable.'[91] In *Genin v. Estonia*, the arbitral tribunal held that, for a finding of arbitrariness, 'any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action'.[92] This test seems stricter than the one applied by other tribunals. There can be no doubt that such extreme cases would be covered by the purview of arbitrariness.

A finding of bad faith is extremely rare, however, as it would presuppose that the respondent applied the measure with the intention to harm foreign interests. To the author's knowledge, such a finding was neither handed down in a trade[93] nor in an investment dispute.[94] The Appellate Body in *US – Offset Act (Byrd Amendment)* clarified that 'Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a

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87 *LG&E v. Argentina* (ICSID Case No. ARB/02/1), para. 158 (emphasis added).
88 *Pope & Talbot v. Canada* (Award on the Merits of Phase 2, 10 Apr. 2001), paras 177–179.
89 Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144.
90 Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.388.
91 Appellate Body Report, *US – Gasoline*, at 28. *See also* Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, 16 Feb. 2001, paras 11.324–11.330.
92 *Genin v. Estonia* (ICSID Case No. ARB/99/2) (Award, 25 Jun. 2001), para. 371.
93 Matsushita & others, *supra* n. 45, at 63.
94 Salacuse, *supra* n. 50, at 266.

conclusion.'[95] In the present context, an infringement has already been found. Otherwise, an adjudicatory body would not get to the chapeau stage. What is more, following the order of analysis endorsed by the Appellate Body, the question of whether the measure at issue pursues a legitimate public welfare objective has been answered in the affirmative. A hypothetical example might be the selective application of import control measures that are, in principle, justified.[96]

3.3[c] *Measures with Competing Purposes*

We said in the foregoing that 'arbitrary' means that no reasonable explanation can be given for the measure at issue. A textbook example would be: a respondent pretends that the measure at issue has a policy objective falling under an exception; in truth, the measure was adopted for protectionist reasons, that is, the measure has a rationale different from the one stated. In this regard, it is disputed whether an explanation is only to be found reasonable if it is related to a listed ground of justification or whether other (legitimate) explanations can also thwart a claim of arbitrariness.

The first view was advanced by the Appellate Body in *Brazil – Retreaded Tyres* and then softened in *EC – Seal Products*. In *Brazil – Retreaded Tyres*, the Appellate Body found a violation of the chapeau because the explanation given had 'no rational connection to the *objective falling within the purview of a paragraph of Article XX*, or would go against that objective'.[97] On that basis, the 'rational connection' requirement is *the* criterion to determine arbitrariness. In *EC – Seal Products*, the Appellate Body opined that 'the relationship of the discrimination to the objective of a measure is one of the most important factors, but *not the sole test*, that is relevant to the assessment of arbitrary or unjustifiable discrimination'.[98] In other words, other unrelated factors may be relevant to the assessment of whether regulatory distinctions are arbitrary. Still, this approach has been criticized in the literature for not being deferential enough towards the delicate weighing of competing interests performed by national legislatures.[99] We will address this criticism hereinafter. It is worth noting that a case comparable to *Brazil – Seal Products* (administrative practice in relation to discretionary decisions under an exception to the measure at issue) was dealt with equally by the European Court of Justice.[100] After the *Brazil – Retreaded Tyres* case, but before *EC – Seal Products*, an arbitral tribunal ruled that:

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95 Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, 27 Jan. 2003, para. 298.

96 *See* Müller-Graff, *supra* n. 27, at para. 163.

97 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227 (emphasis added).

98 Appellate Body Report, *EC – Seal Products*, para. 5.321 (emphasis added).

99 Gracia Marín Durán, *supra* n. 59, at 470, 480; Rachel Harris & Gillian Moon, *GATT Article XX and Human Rights: What Do We Know from the First 20 Years* 16 Melb. J. Int'l L. 432, 458 f (2015); Howse, Langille & Sykes, *supra* n. 24, at 123.

100 Case 27/80, *Fietje* [1980], para. 14.

> There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.[101]

The references to the 'correlation between the state's public policy objective and the measure adopted to achieve it' and 'the way it is implemented' are reminiscent of the case law of the Appellate Body. This is another example of how international trade and investment law cross-fertilize each other.

In *Indonesia – Import Licensing Regimes*, the respondent invoking Article XX GATT sought to justify its import licensing regimes relating to horticultural and animal products, inter alia, on grounds of public health (food safety and food security, subparagraph (b))[102] and public morals (Halal religious food laws, subparagraph (a)).[103] Under the chapeau, the panel found that the true aim of the respondent's licensing regimes was self-sufficiency regarding the foodstuffs covered.[104] In short, since self-sufficiency is not listed in the subparagraphs of Article XX GATT as an accepted ground of justification, the panel concluded that a rational connection is lacking.[105] This replicates the approach taken by the Appellate Body in *Brazil – Retreaded Tyres*[106] and was not addressed in the appellate review.

3.3[d] *Chapeau and Non-WTO Law*

In the author's view, an explanation should be allowed to differ from the grounds of justification in the subparagraphs and still be considered reasonable.[107] In the case of *EC – Seal Products*, an animal welfare measure sought to consider the competing interests of indigenous communities in an exception clause.[108] The Appellate Body took the stance that the respondent should have demonstrated 'how the discrimination resulting from the manner in which the [measure is applied] can be reconciled with, or is related to, the policy objective of addressing *EU public moral concerns*

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101 *AES v. Hungary (II)* (ICSID Case No. ARB/07/22) (Award, 23 Sept. 2010), paras 10.3.7–10.3.9.
102 Panel Report, *Indonesia – Import Licensing Regimes*, paras 7.607, 7.662, 7.722, 7.752, 7.778.
103 *Ibid*., paras 7.637, 7.640, 7.694.
104 *Ibid*., para. 7.822.
105 *Ibid*., para. 7.824.
106 *Ibid*., paras 7.817, 7.823. *See* Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
107 *Pro* Marín Durán, *supra* n. 59, at 477.
108 Art. 3(1) of the Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 Sept. 2009 on trade in seal products.

regarding seal welfare'.[109] However, the salient point is that under certain circumstances indigenous interests, according to the assessment of the European legislature, can trump animal welfare. In such a situation, as pointed out by Marín Durán, 'it is simply pointless to ask whether the reasons given for the discrimination resulting from that exception are rationally connected to the measure's main objective'.[110] It is the very nature of an exception to go against the objective of the measure. Shaffer and Pabian submit that:

> by examining the discriminatory impact of the European Union's application of the [indigenous communities] exception, the Appellate Body suggested … that the exception would otherwise have been fine even though it did not advance the underlying objective of protecting public morals concerns regarding seal welfare … It appears to be moving toward accommodating any *legitimate regulatory purposes* under the chapeau (such as the protection of the rights of indigenous communities) so long as the underlying measure falls within one of the policy objectives listed in Article XX(a)–(j) …[111]

An alternate approach would have been to recognize as 'public morals' not individual interests (animal welfare, indigenous interests) but the outcome of the legislative weighing-up as such, i.e. the regulatory compromise between those competing interests. Indeed, there are many more legitimate explanations, not just the ones enumerated in the subparagraphs. A reasonable explanation may be derived from other sources of international law such as indigenous peoples' rights. This opens up the chapeau for an inflow of other regulatory purposes acknowledged in international law. On that reading, the chapeau becomes a gateway for the consideration of other rules of international law, thus making WTO law more amenable to public international law. When the international community recognizes a particular regulatory purpose as legitimate, this should be dispositive for WTO adjudicatory bodies, especially if the respective rule of international law is binding upon the complainant (*venire contra factum proprium*).

In *EC – Seal Products*, the Inuit exception could be backed up by international law relating to indigenous rights, such as the Convention concerning Indigenous and Tribal Peoples in Independent Countries[112] and the UN Declaration on the Rights of Indigenous Peoples.[113] When a particular domestic policy is prompted by an international law obligation, this is a strong indication that the policy is not for

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109 Appellate Body Report, *EC – Seal Products*, para. 5.320 (emphasis added).

110 Marín Durán, *supra* n. 59, at 475 f.

111 Gregory Shaffer & David Pabian, *World Trade Organization – Agreement on Technical Barriers to Trade – General Agreement on Tariffs and Trade – Discrimination – Protection of Public Morals Regarding Animal Welfare – Indigenous Communities*, 109 Am. J. Int'l. L. 154, 160 (2015) (emphasis in original).

112 Art. 23(1) of the ILO 'Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries' (adopted 27 Jun. 1989, entered into force 5 Sept. 1991) 1650 UNTS 383.

113 Art. 20(1) of the UNGA Res 61/295 'United Nations Declaration on the Rights of Indigenous Peoples' (13 Sept. 2007) GAOR 61st Session Supp. 49 vol. 3, 15.

protectionist reasons. These international law instruments mirror public morals not only in the respondent but internationally. In this vein, international benchmarks can be used to confirm the genuineness of a defence.[114] The problem with the measure at issue in *EC – Seal Products* was that indigenous communities located in the territory of the complainant were, for no good reason, treated differently from indigenous communities living in another territory.[115] Once this was rectified, the Inuit exception could stand.[116] Moreover, indigenous rights are not absolute but limited by competing legitimate policy objectives such as animal welfare. Hence one of the criteria to be taken into account according to the amended exception is the manner in which the hunt is conducted.[117]

Also, the arbitrariness test may entail a comparison of laws, because should a measure like the measure at issue have been adopted by a number of other states, such a finding would militate against a determination of arbitrariness. In *Noble Ventures v. Romania*, the arbitral tribunal denied arbitrariness on the grounds that 'Such proceedings are provided for in all legal systems and for much the same reasons … [The] situation … would have justified the initiation of comparable proceedings in most other countries.'[118] An argumentation of this kind is not unknown in WTO law. The panel in *US – Gambling* referred to the laws of other Members to corroborate its finding that certain restrictions on gambling are in conformity with public morals.[119]

3.4 Disguised restriction

The chapeau mentions 'discrimination' and 'restriction' and thus alludes to the two most prominent barriers to trade (aside from customs duties). The prohibitions of discrimination and restrictions reflect different levels of market integration. The Appellate Body in *US – Gasoline* established that 'restriction' within the chapeau is the broader concept and includes 'discrimination'.[120] From this it follows that its scope goes beyond quantitative restrictions[121] and also applies to discriminatory measures. Against Lo,[122] a 'restriction' within the meaning of the chapeau is not only a transgression of the national treatment obligation; it also concerns non-

114 Howse, Langille & Sykes, *supra* n. 24, at 119.
115 Appellate Body Report, *EC – Seal Products*, para. 5.337. For a succinct summary of the Appellate Body reasoning, *see* Matsushita & others, *supra* n. 45, at 729.
116 European Commission, *Trade in Seal Products* (5 Oct. 2017), http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm (accessed 12 Feb. 2018).
117 Art. 3(1)(c). Consolidated version of the amended Regulation available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02009R1007-20151018&qid=1489446929899.
118 *Noble Ventures v. Romania* (ICSID Case No. ARB/01/11) (Award, 12 Oct. 2005), para. 178.
119 Panel Report, *US – Gambling*, paras 6.470–6.473.
120 Appellate Body Report, *US – Gasoline*, at 25.
121 Art. XI GATT, Art. XVI GATS.
122 Lo, *supra* n. 33, at 126.

discriminatory limitations on market access. The same holds true for European primary law.[123] By the same token, the *Indonesia – Import Licensing Regimes* case exemplifies that arbitrary discrimination can not only exist between foreign products/traders but also in relation to domestic ones.[124] Both the MFN as well as the national treatment limb are encompassed.

In sum, every discrimination restricts trade (namely to the detriment of the Member discriminated against), but not every restriction is perforce discriminatory; a non-discriminatory measure may have adverse effects, i.e. be restrictive, on foreign traders. A restriction is tantamount to a case of nullification or impairment of benefits under the covered agreements.[125] The Appellate Body observed in *US – Shrimp* that non-compliance with the chapeau would 'distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement'.[126] Therefore, the term 'restriction' captures the entire remit of the chapeau. Again, the crux of the matter is the attributive adjective 'disguised'.

There is agreement that covert protectionism is prohibited. What is controversial is how to determine that. As a preliminary point, it should be noted that it does not matter whether the measure at issue was announced or not. Under WTO law, mere state conduct is subject to scrutiny.[127] If the underlying legal basis is in writing, or if there is one in the first place, is immaterial for state conduct to come under the jurisdiction of the WTO adjudicating bodies.[128] 'Measure' is the broadest possible term to describe the subject matter of a case, its cause.[129]

The European Court of Justice contemplates 'the real aim' of the measure at issue.[130] According to Bossche and Prévost, a 'disguised restriction' is given when 'the design, architecture or structure of the measure at issue reveals that this measure does in fact not pursue the legitimate policy objectives on which the provisional justification was based but, in fact, pursues trade-restrictive (i.e. protectionist) objectives'.[131] But this has been taken into account under the subparagraphs, notably the necessity test. That test involves an appraisal of whether the measure at issue makes a contribution to the achievement of the policy objective put forward by the

123 Bröhmer, *supra* n. 77, para. 51.
124 Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.815 (not appealed).
125 *See* Art. 3.8 DSU.
126 Appellate Body Report, *US – Shrimp*, para. 159.
127 Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, 9 Jan. 2004, para. 81.
128 *See* Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')*, WT/DS294/AB/R, 9 May 2006, paras 192 f.
129 *See* Arts 4.4 and 6.2 DSU.
130 Case 40/82, *Commission v. United Kingdom (Newcastle Disease)* [1984] ECR 283, para. 37.
131 Peter Van den Bossche & Denise Prévost, *Essentials of WTO Law* 104 (CUP 2016).

respondent.[132] Just like in European Union law, a disguised restriction will either not be necessary or not be related to the stated policy objective and therefore, in most cases, fall through at that stage.[133] Bartels specifies that the term 'disguised', in the present context, denotes 'measures for which an improper purpose is "disguised" by an ostensibly legitimate purpose'.[134] An example from EU law would be if a trademark owner (mis)uses its trademark to foreclose repackaged parallel imports from the market of the respondent and the national trademark law of the respondent provides for that misuse.[135]

Lo contends that 'If there has already been an effect of protecting domestic production arising from the measure, GATT Article XX should not serve as a defense …, even though there is no intention to misrepresent or to deceive other countries or traders.'[136] For Lo, 'protective effect' is the determinative criterion.[137] But what if a measure that pursues a legitimate purpose has the protection of domestic production as a side effect? Lo wants to examine under the heading of 'protective effect' 'whether a competitive condition has been changed'.[138] However, Lo's interpretation does not add anything, as adverse effects on the competitive relationship will already have been found at the infringement stage.

4 ORDER OF ANALYSIS

The Appellate Body is adamant that the subparagraphs be examined prior to the chapeau.[139] Bartels counters that the order of analysis should be determined by judicial economy.[140] The author agrees with Bartels in that there is no strict legal requirement to begin the legal analysis with the subparagraphs. Furthermore, it is fair to qualify the requirements in the chapeau as 'horizontal', as they apply to all the subparagraphs, thereby specifying the (necessity/relationship) tests contained therein.[141] That said, it is equally true that in most cases it makes sense to identify the policy objective (allegedly) pursued by the measure at issue first before engaging with the other requirements of the exception clause.[142] As the Appellate Body put it:

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132 Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, 10 Jan. 2001, para. 164.
133 Cf. Müller-Graff, *supra* n. 27, at para. 171.
134 Bartels, *supra* n. 13, at 125.
135 Case 102/77, *Hoffmann-La Roche v. Centrafarm* [1978] ECR 1139700>; Case C-143/00, *Boehringer* et al. *v. Swingward and Dowelhurst* [2002] ECR I-3759.
136 Lo, *supra* n. 33, at 121, 123.
137 *Ibid*., at 121.
138 *Ibid*., at 130.
139 Appellate Body Report, *US – Shrimp*, para. 119.
140 Bartels, *supra* n. 13, at 124.
141 *Ibid*.
142 *See also* Marín Durán, *supra* n. 59, at 485, with respect to Art. 2.1 TBT Agreement.

'considering first the measure at issue under the applicable paragraphs of Article XX provides panels with the necessary tools to assess that measure under the *chapeau* of Article XX'.[143] The reason is that the importance of the objective pursued also matters for purposes of the chapeau:[144] the stringency with which the chapeau is applied in a particular case is influenced by the importance of the non-trade values at stake.[145] For some exceptions are more prone to abuse than others.[146] Just think of the defence of censorship laws under the public morals exception in *China – Publications and Audiovisual Products*[147] as compared to a universally shared value such as human health. The Appellate Body alluded to that in *US – Shrimp* when stating that 'The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.'[148] Another reason advanced by the Appellate Body is that non-compliance with the chapeau has different implications for the implementation of a ruling than a finding that the measure at issue is not provisionally justified.[149] In *Indonesia – Import Licensing Regimes*, the Appellate Body thus reaffirmed the established order of analysis, with the caveat that a departure from this order is not, 'for that reason alone', tantamount to 'a reversible legal error'.[150]

5 BURDEN OF PROOF

According to the Appellate Body, it is incumbent upon the responding party to demonstrate that the measure at issue is applied consistently with the chapeau.[151] The Appellate Body acknowledged that 'That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.'[152] For instance, if a respondent asserts that conditions are not the same, the burden of proof rests with the respondent in that regard.[153] Conversely, at

143 Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.96.
144 *Ibid*., para. 5.98.
145 *See* Ulrike Will, *The Extra-Jurisdictional Effects of Environmental Measures in the WTO Law Balancing Process*, 50 J. World Trade 611, 624 (2016); Davies, *supra* n. 42, at 523.
146 Cf. Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. Int'l Econ. L. 43, 74 (2008).
147 Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 19 Jan. 2010, para. 205.
148 Appellate Body Report, *US – Shrimp*, para. 159.
149 Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.100.
150 *Ibid*., paras 5.100 f.
151 Appellate Body Report, *US – Gasoline*, at 22 f; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 5.297.
152 Appellate Body Report, *US – Gasoline*, at 23.
153 Van den Bossche & Prévost, *supra* n. 131, at 103.

the infringement stage, the burden of proof is on the complainant to establish inconsistency with a WTO provision.[154]

Following the suggested approach to align 'discrimination'/'restriction' in the chapeau with the substantive obligations has implications for the burden of proof as well. The author argues that, with respect to burden of proof under the chapeau, a more differentiated approach is apposite and indeed taken: Initially, it is the complainant who has to show arbitrary discrimination or a disguised restriction prima facie. Then the burden shifts to the respondent to refute such assertion, primarily by demonstrating a rational connection with one of the policy objectives contained in the subparagraphs.[155] Next, the complainant can disprove this connection by revealing the 'actual' objective behind the measure at issue. Gaines first proposed a presumption of compliance with the chapeau with a view to reducing the chapeau's stringency.[156] In short, it would be on the complainant to establish non-compliance with the chapeau first. This is also in line with the accepted precept that 'the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof'.[157] Here, the assertion (arbitrary discrimination or disguised restriction) is made by the complainant. Consequently, it should be on the complainant to establish where the arbitrary application or disguised restriction lies. A similar shift in the burden of proof is recognized under the necessity test: it is not on the respondent 'to demonstrate that there are *no* reasonably available alternatives that would achieve its objectives'.[158]

Au contraire, if one insisted that the responding party showed that the measure at issue *does not* constitute a means of arbitrary discrimination or a disguised restriction, one would force it to prove a negative. Although language can be twisted (consistency with the chapeau as opposed to non-existence of arbitrariness or disguised restrictions),[159] the Appellate Body in *Japan – Agricultural Products II* deemed the requirement to prove a negative 'an impossible and, therefore, erroneous burden of proof'[160] and in *US – Softwood Lumber VI (Article 21.5 – Canada)* 'an

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154 Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 13 Feb. 1998, para. 98.

155 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227; Appellate Body Report, *EC – Seal Products*, paras 5.306, 5.318.

156 Gaines, *supra* n. 48, at 852.

157 Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, 23 May 1997, at 14.

158 Appellate Body Report, *China – Publications and Audiovisual Products*, para. 319 (emphasis in original).

159 *See* Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* 194 (OUP 2009).

160 Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, 19 Mar. 1999, para. 137.

unduly high burden'.[161] The present situation is comparable to the situation in *Canada – Pharmaceutical Patents* in respect of which the panel held:

> The third condition of Article 30 [TRIPS Agreement] is the requirement that the proposed exception must not 'unreasonably prejudice the legitimate interests of the patent owner …' Although Canada, as the party asserting the exception provided for in Article 30, bears the burden of proving compliance with the conditions of that exception, the order of proof is complicated by the fact that the condition involves proving a negative. One cannot demonstrate that no legitimate interest of the patent owner has been prejudiced until one knows what claims of legitimate interest can be made.[162]

In terms of litigation strategy, both disputants are advised to articulate in their submissions the objective(s) of the impugned measure as they see it.

In *Indonesia – Import Licensing Regimes*, after the co-complainants, New Zealand and the United States, had established that 'the actual policy objective behind all these measures is to achieve self-sufficiency through domestic production by way of restricting and, at times, prohibiting imports',[163] the respondent could not show that, in truth, the measures' policy objective is 'rationally related' to the ones in the subparagraphs.[164] In that case, the panel did not need to decide whether food security would be considered a legitimate ground of justification in terms of an exception.

6 POTENTIAL OF THE CHAPEAU FOR PROCEDURAL GUARANTEES

6.1 Focus on procedure

6.1[a] *Application of the Measure*

It is settled case law of the Appellate Body that the chapeau deals with the application of the measure at issue, and 'not so much … its specific contents as such'.[165] That is, the Appellate Body does not only dissect the text of a measure (under the subparagraphs), but also looks at how the measure is implemented by domestic authorities (under the chapeau). Therefore, administrative procedures implementing a government measure are subject to judicial scrutiny in accordance with the chapeau. The Appellate Body deduced this bifurcation of analysis from the chapeau's wording ('not applied in a manner which'). It concluded that 'discrimination results … when the

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161 Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW and Corr.1, 9 May 2006, para. 130.

162 Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, 7 Apr. 2000, para. 7.60.

163 Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.

164 *Ibid*., para. 7.824 (not appealed).

165 Since Appellate Body Report, *US – Gasoline*, at 22.

application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries'.[166] The Appellate Body contrasts here the regulatory programme with the application of the measure at issue.

It is a common feature for statutes to be implemented by authorities and that the decisions of the authorities are guided by administrative regulations. There is a distinction the framers might have thought of when drafting the chapeau: the distinction between legislation and law enforcement.[167] The Appellate Body specified in *US – Shrimp* that the latter does not only imply an examination of the operating provisions of the measure at issue, including concomitant administrative regulations, but an examination of its *actual* application in practice.[168] In short, the chapeau is concerned with the method by which government action should take place.

The distinction between administrative and substantive rules appears to be engrained in the WTO legal system. Article X GATT, too, distinguishes between the administration and the substantive content of measures.[169] The Appellate Body in *EC – Selected Customs Matters* noted that 'Under Article X:3(a), a distinction must be made between the legal instrument being administered and the legal instrument that regulates the application or implementation of that instrument.'[170] It further ruled that 'the substantive content of legal instruments that regulate the application or implementation of laws, regulations, decisions, and administrative rulings of the kind described in Article X:1 can be challenged under Article X:3(a)'.[171] The same holds true for the chapeau. However, because the Appellate Body also scrutinizes exceptions to the measure at issue under the chapeau,[172] the distinction between the subparagraphs (i.e. the substance of the measure) and the chapeau (i.e. the application of the measure) becomes blurred.

6.1[b] *Rule of Law*

Although the chapeau contains 'both substantive and procedural requirements',[173] it follows from the above considerations that its focus is on the procedural aspects of the measure at issue, according to some commentators, in particular, on due process and

166 Appellate Body Report, *US – Shrimp*, para. 165.
167 *See* Appellate Body, *US – Gambling*, para. 356.
168 Appellate Body Report, *US – Shrimp*, para. 160.
169 Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, 23 Jul. 1998, para. 115; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 25 Sept. 1997, para. 200.
170 Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, 11 Dec. 2006, para. 200.
171 *Ibid*., para. 210.
172 *See* e.g. Appellate Body Report, *EC – Seal Products*, para. 5.328.
173 Appellate Body Report, *US – Shrimp*, para. 160.

transparency.[174] Bartels posits that 'treating arbitrary discrimination in terms of due process is at odds with the historical background to the chapeau'.[175] That said, in many complex cases the procedure is used as a proxy to assess the legality of substantive law. This is a trend observed in the jurisprudence of the European Court of Justice.[176] The definition of arbitrariness, as seen at the heart of the chapeau analysis, seems to corroborate that. Additionally, the International Court of Justice correlated that concept with 'due process' by defining 'arbitrariness' as the opposite of the rule of law: 'It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.'[177] This is in line with the Appellate Body reading of arbitrariness as an evasion of the law. The author recalls that, according to the Appellate Body, 'the chapeau serves to ensure that Members' rights to avail themselves of exceptions are [not] exercised … as *a means to circumvent one Member's obligations* towards other WTO Members'.[178]

6.2 Due process

Black's Law Dictionary defines 'due process' as '[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.'[179] The *Oxford Dictionaries Online* emphasize the impartiality of the decision-maker.[180] The Appellate Body concretized the principle of due process for purposes of WTO law. It covers a right to be heard, transparency of procedures, completion of procedures within a reasonable period of time, and the possibility of review.[181]

6.2[a] *Link to Article X GATT and Article VI GATS*

The Appellate Body stated in *US – Shrimp* that 'rigorous compliance with the fundamental requirements of due process should be required in the application and

174 Ala'i, *supra* n. 20, at 1027; Ioannidis, *supra* n. 84, at 1197, 1199, 1202; Matsushita & others, *supra* n. 45, at 748.
175 Bartels, *supra* n. 13, at 122.
176 Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law* 894 (3rd ed., CUP 2014).
177 *Case Concerning Elettronica Sicula (ELSI) (United States of America v. Italy)*, Judgment, [1989] ICJ Rep. 15, 76 para. 128.
178 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215 (emphasis added).
179 Garner, 'due process'.
180 Oxford Dictionaries Online, *Due Process*, https://en.oxforddictionaries.com/definition/due_process (accessed 12 Feb. 2018).
181 *See also* Andrew Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 Mich. J. Int'l L. 559, 586 (2010); Chalmers, Davies & Monti, *supra* n. 176, at 922–24. For the evolution of international due process, *see* Kotuby Jr. & Sobota, *supra* n. 21, at 54–73.

administration of a measure which purports to be an exception to the treaty obligations'.[182] In other words, the Appellate Body reads 'due process requirements' into the chapeau. Ala'i infers from this that the case law relating to Article X:3(a) GATT is applicable to the effect that a measure would be found arbitrary within the meaning of the chapeau if it was not administered 'in a uniform, impartial and reasonable manner'.[183] The *US – Shrimp* ruling seems to support this inference.[184] The same must apply mutatis mutandis to the chapeau of Article XIV GATS with respect to Article VI:1 GATS.

Two things should be noted: First, Article X:3(a) GATT can also be invoked independently.[185] That is, a measure the substance of which is WTO consistent can still be challenged under WTO law on the basis that it is administered in a manner that disregards administrative due process. Moreover, whereas Article X GATT concerns governance in relation to a Member's own citizens, too,[186] WTO adjudicating bodies, under the chapeau, only review measures taken in relation to foreign traders.

6.2[b] *Right to be Heard*

In *US – Shrimp*, the Appellate Body reprimanded the respondent for not providing a 'formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made'.[187] From this a right to be heard by the competent authorities can be distilled, including a right to submit evidence.

6.2[c] *Transparency*

Transparency is pivotal to good governance, as it enhances the legitimacy of the respective entity.[188] This principle comprises several aspects. First of all, it involves the duty on the part of domestic authorities to grant access to relevant information,

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182 Appellate Body Report, *US – Shrimp*, para. 182.

183 Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. Int'l Econ. L. 779, 801 (2008). For the history of Art. X GATT, *see* Silke Steiner & Friedl Weiss, *Transparency as an Element of Good Governance in the Practice of the WTO*, in *International Law and Developing Countries: Essays in Honour of Kamal Hossain* 270 f (Sharif Bhuiyan, Philippe Sands & Nico Schrijver eds, Brill 2014).

184 Appellate Body Report, *US – Shrimp*, paras 182 f.

185 *See* e.g. Appellate Body Report, *EC – Selected Customs Matters*, paras 190–287.

186 Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, 25 Feb. 1997, at 21 ('whether of domestic or foreign nationality').

187 Appellate Body Report, *US – Shrimp*, para. 180.

188 Steve Charnovitz, *The WTO and Cosmopolitics*, 7 J. Int'l Econ. L. 675, 679 (2004); Salacuse, *supra* n. 50, at 260.

secondly, to give reasons for their decisions, and thirdly, for those reasons to have a rational basis. This entails, fourthly, the duty to use objective and clear criteria.

6.2[c][i] Access to Information

The WTO Glossary defines 'transparency' as the '[d]egree to which trade policies and practices, and the process by which they are established, are open and predictable.'[189] The Preamble to the Revised Agreement on Government Procurement recognizes 'the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption'.[190] Furthermore, Part B of the Trade Policy Review Mechanism provides that 'Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system'. The Appellate Body stated in the context of Article X:2 GATT that 'Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures.'[191] The principle of transparency thus denotes the access to and sharing of information, for example, about market opportunities such as government contracts.[192]

6.2[c][ii] Duty to Give Reasons

The Appellate Body in *US – Shrimp* went on to criticize that 'Countries whose applications are denied also do not receive notice of such denial … or of the reasons for the denial.'[193] The same duty to give reasons exists in European Union law: 'In order to enable the impartiality of the authorisation procedures to be monitored, it is also necessary for the competent authorities to base each of their decisions on reasoning which is accessible to the public, stating precisely the reasons for which, as the case may be, authorisation has been refused.'[194]

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189 WTO, *Glossary*, https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm (accessed 12 Feb. 2018).
190 Recital 6.
191 Appellate Body Report, *US – Underwear*, at 21.
192 Ala'i, *supra* n. 183, at 780, fn. 6; Steiner & Weiss, *supra* n. 183, at 262.
193 Appellate Body Report, *US – Shrimp*, para. 180 (footnotes omitted).
194 Case C-470/11, *Garkalns*, Judgment of 19 Jul. 2012, para. 43.

6.2[c][iii] Objectivity and Clarity of Criteria

As seen, Article X:3(a) GATT bears upon the exegesis of the chapeau. The requirement of uniform administration in Article X:3(a) GATT was interpreted by the panel in *US – Stainless Steel* as meaning 'uniformity of treatment in respect of persons *similarly situated*'.[195] This is reminiscent of the chapeau element 'where the same conditions prevail' and shows how the provisions are interrelated. In this connection, the question of whether the discretion of authorities implementing national legislation is unfettered or constrained is relevant. In *EC – Seal Products*, the Appellate Body took issue with 'the ambiguities in the criteria of the [measure] and the broad discretion that the recognized bodies consequently enjoy in applying these criteria'.[196] Similarly, in *Occidental v. Ecuador (I)*, an arbitral tribunal found arbitrariness on account of 'confusion and lack of clarity'.[197] Further lessons can be learnt from European Union law. For instance, the European Court of Justice held in *Watts v. Bedford Primary Care Trust* that 'a system of prior authorisation … must in any event be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily'.[198] It follows that the precept of transparency implies the duty to apply objective and clear criteria.[199]

6.2[d] *Completion of Procedures Within a Reasonable Period of Time and Possibility of Review*

The panel in *Thailand – Cigarettes (Philippines)* deemed delays in a domestic review process to be unreasonable.[200] Furthermore, the Appellate Body in *US – Shrimp* disapproved of the fact that 'No procedure for review of, or appeal from, a denial of an application is provided.'[201] By the same token, the European Court of Justice in *Watts v. Bedford Primary Care Trust* ruled that national procedures must ensure that 'a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings'.[202]

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195 Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, 1 Feb. 2001, para. 6.51 (emphasis added).

196 Appellate Body Report, *EC – Seal Products*, para. 5.328. For EU law, *see* Case C-470/11, *Garkalns*, para. 46.

197 *Occidental v. Ecuador (I)* (LCIA Case No. UN3467) (Award, 1 Jul. 2004), para. 163.

198 Case C-372/04, *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325, para. 116 (citations omitted).

199 Note that Art. VI:1 GATS uses the term 'objective' instead of 'uniform'.

200 Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, 15 Jul. 2011, para. 7.969.

201 Appellate Body Report, *US – Shrimp*, para. 180.

202 Case C-372/04, *Watts*, para. 116 (citations omitted). *See also* Case C-24/00, *Commission v. France (French Vitamins)* [2004] ECR I-1277, para. 26.

6.2[e] *Protection of Confidential Business Information*

Moreover, government authorities are under an obligation to protect confidential business information received from foreign traders against disclosure.[203]

6.3 Conclusions

Steiner and Weiss comment that 'the WTO has already made considerable progress in securing transparency, *albeit as a principle rather than as an enforceable right*'.[204] But government measures are scrutinized in the light of the chapeau. The chapeau gives the principle of due process, which includes the principle of transparency, teeth, as the administration of measures can be challenged before the WTO. Article X:3(a) GATT coins administrative due process for WTO purposes. As a consequence, the chapeau forces Members to have procedural safeguards in place, thereby promoting good governance, notably good administration, domestically.[205]

Having said that, even if a measure fails the chapeau test, it can still be saved by the respondent improving its administration. In that sense, it is fair to say that 'the Chapeau is concerned with *under*-regulation'.[206] This is different when the measure at issue founders on the subparagraphs. That is, at the end of the day, the chapeau does not ultimately decide whether a government measure stands or falls.[207]

7 POTENTIAL OF THE CHAPEAU FOR GOOD GOVERNANCE

While due process is concerned with procedural fairness, some aspects of it can be extrapolated for the benefit of good governance in general. According to the UN Economic and Social Commission for Asia and the Pacific, the principle of good governance encompasses eight characteristics: 'participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law'.[208]

The indirect influence of the chapeau can be seen in the EU emissions trading system. With regard to aviation emissions, an international agreement was negotiated

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203 Panel Report, *Argentina – Hides and Leather*, para. 11.94.

204 Steiner & Weiss, *supra* n. 183, at 287 (emphasis added).

205 *See also* Ioannidis, *supra* n. 84, at 1197.

206 Lorand Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, 23 Eur. J. Int'l L. 429, 452 (2012) (emphasis in original).

207 Ming Du, *Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization*, 50 J. World Trade 675, 694 (2016).

208 UN Economic and Social Commission for Asia and the Pacific, *What Is Good Governance?* (2009), ht tp://www.unescap.org/resources/what-good-governance (accessed 12 Feb. 2018). For the development of the principle of good governance, *see* Matthias Kötter, *Good Governance* 553 ff (Philipp Dann, Stefan Kadelbach & Markus Kaltenborn eds, Nomos 2014).

under the auspices of the International Civil Aviation Organization, allowing the EU to maintain a 'cap and trade' system,[209] which some considered at odds with the chapeau.[210] Prior to the multilateral agreement, the European Union limited the application of its emissions trading system to the European Economic Area.[211]

7.1 Consistency

According to the European Court of Human Rights, the principle of good governance requires that 'the public authorities must act in good time and in an appropriate and above all consistent manner'.[212] Furthermore, it imposes 'on the authorities an obligation to act promptly in correcting their mistake'.[213] A requirement of consistency can be deduced from the prohibition of arbitrariness in the chapeau.[214] Contrariwise, the chapeau calls for a certain degree of flexibility in the administration of the measure at issue so as to 'allow for [an] inquiry into the appropriateness of the regulatory program for the conditions prevailing in … exporting countries'.[215] In short, to be compliant, a measure must make allowance for special circumstances in exporting countries.[216] In addition, as exemplified in *EC – Seal Products*, some inconsistency or exceptions are testament to the fact that domestic legislatures are mandated to weigh up competing interests.[217]

In *US – Shrimp*, the Appellate Body found that 'rigidity and inflexibility' constitute a case of arbitrary *and* unjustifiable discrimination within the meaning of the chapeau.[218] *In casu*, the national authorities lacked discretion to apply the measure at issue in a WTO-compliant manner. Product life cycle laws, such as the EU Packaging Directive,[219] are another case in point.[220] Conversely, if the

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209 European Commission, *Reducing Emissions from Aviation* (12 Feb. 2018) Climate Action, https://ec.europa.eu/clima/policies/transport/aviation_en (accessed 12 Feb. 2018); European Commission, *The EU Emissions Trading System* (11 Feb. 2018) Climate Action, https://ec.europa.eu/clima/policies/ets_en (accessed 12 Feb. 2018).

210 Matsushita & others, *supra* n. 45, at 767.

211 EU Member States, Iceland, Liechtenstein, Norway.

212 ECtHR, *Rysovskyy v. Ukraine*, App. No. 29979/04, 20 Oct. 2011, para. 70.

213 *Ibid*., para. 71.

214 Panel Report, *US – Gambling*, para. 6.584. *See also* Van den Bossche & Prévost, *supra* n. 131, at 110; Andrew Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law*, 14 Chi. J. Int'l L. 93, 136 (2013).

215 Appellate Body Report, *US – Shrimp*, para. 165.

216 *Ibid*., para. 177.

217 Appellate Body Report, *EC – Seal Products*, para. 5.319. *See also* Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 Yale J. Int'l L. 367, 419, 429 (2012).

218 Appellate Body Report, *US – Shrimp*, paras 165, 177.

219 European Parliament and Council Directive 94/62/EC of 20 Dec. 1994 on packaging and packaging waste. A consolidated version is available at: http://ec.europa.eu/environment/waste/packaging/legis.htm.

220 Matsushita & others, *supra* n. 45, at 753.

discretion is too broad, as the ambiguous exception in *EC – Seal Products*, the measure might founder on the chapeau for that very same reason.[221]

These seemingly contradictory propositions can be reconciled, however, by focusing on the rationale given by the implementing authority: what has to be consistent is the criteria used to come to a decision. As long as the implementing authority applies the criteria consistently, the outcome may differ depending on the conditions in the exporting country. This becomes apparent from comparing the chapeau with Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),[222] which uses similar wording in relation to levels of sanitary or phytosanitary protection. Article 5.5 provides as follows:

> *With the objective of achieving consistency* in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.[223]

This does not mean that a Member could not change the criteria it applies (provided the new criteria are objective and clear). Mere departure from 'established policy' is not sufficient to find non-compliance with the chapeau. In *US – Stainless Steel (Korea)*, the panel had 'grave doubts' about freezing a Member's national legal framework in the sense of a stabilization clause.[224] Akin to the line of argument in investment law,[225] the interest of foreign traders in stability is pitted against the respondent's right to regulate.

7.2 Proportionality

7.2[a] *The Test*

The 'line of equilibrium' language that the Appellate Body uses to describe its interpretive approach to the chapeau is evocative of a proportionality test. The principle of proportionality is a judicial tool employed to balance out competing societal values and interests.[226] It structures the legal analysis[227] and is characterized

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221 Appellate Body Report, *EC – Seal Products*, para. 5.328.

222 WTO Agreement on the Application of Sanitary and Phytosanitary Measures (signed 15 Apr. 1994, entered into force 1 Jan. 1995) 1867 UNTS 493.

223 Emphasis added.

224 Panel Report, *US – Stainless Steel (Korea)*, para. 6.50.

225 Dolzer & Schreuer, *supra* n. 50, at 149.

226 Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. Int'l Econ. L. 223, 226 (2012); Jacco Bomhoff, *Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 Hastings Int'l & Comp. L. Rev. 555, 574 (2008).

227 Henckels, *supra* n. 226, at 228 f.

by the following stages: (1) legitimate public welfare objective, (2) suitability, (3) necessity, and (4) proportionality *stricto sensu*.[228]

The first question is if the measure is covered by one of the subparagraphs. All policy objectives listed in an exception clause are, by definition, legitimate so that, as long as the measure falls within the ambit of one of the subparagraphs, the legitimacy of the policy objective can be assumed. It is beyond dispute that protecting, for example, public morals or public health is a legitimate policy objective. In the second stage, the adjudicatory body examines whether the measure at issue is capable of promoting the pursued policy objective.[229] This is equivalent to the 'relating to' element in Article XX GATT.[230] In the third stage, the necessity test, the issue is whether there are less trade-restrictive alternative measures that achieve the same level of protection.[231]

Proportionality *stricto sensu*, finally, 'involves an assessment of whether the effects of a measure are … excessive in relation to the interests involved'.[232] Here, the pursued policy objective must not be out of proportion to the severity of the interference. That is, at this stage, the adjudicatory body questions the relative significance of the pursued policy objective. It weighs up the public welfare gain of the measure against the interference caused.[233] In other words, it conducts its own cost-benefit analysis. Andenas and Zleptnig put this last stage in a nutshell: 'The more intense the restriction of a particular interest, the more important the justification for the countervailing objective needs to be.'[234] In the present context, the domestic benefits the measure at issue brings about would be balanced against the foreign costs in reduced trade.[235]

It is disputed whether international courts and tribunals are legitimized to scrutinize this final step. At what stage the legal analysis stops determines how strict the standard of review of a particular forum is.[236] The European Court of Justice read the principle of proportionality into Article 36, second sentence, TFEU, which is, in

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228 *Ibid*., at 227; Peter Van den Bossche, *Looking for Proportionality in WTO Law*, 35 L.I.E.I. 283, 285 (2008) (not counting the 'legitimate public welfare objective' step separately); Kotuby Jr. & Sobota, *supra* n. 21, at 114.

229 Van den Bossche, *supra* n. 228, at 285.

230 For the definition of 'relating to', *see* Appellate Body Report, *US – Shrimp*, para. 141; Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 22 Feb. 2012, para. 355.

231 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; Appellate Body Report, *EC – Asbestos*, para. 172.

232 Van den Bossche, *supra* n. 228, at 285.

233 Henckels, *supra* n. 226, at 228.

234 Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 Tex. Int'l L. J. 371, 390 (2007).

235 Donald Regan, *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost–Benefit Balancing*, 6 World Trade Rev. 347, 350, 366 (2007).

236 Henckels, *supra* n. 226, at 240, 250, 253.

terms of wording and purpose, equivalent to the chapeau.[237] Kingreen regards the clause as encapsulating the essence of what is unjustifiable regardless of the legitimacy of the objectives invoked.[238] In other words, arbitrary discrimination or a disguised restriction could never trump the right to trade. Before addressing the issue of whether the chapeau also includes proportionality *stricto sensu*, we have to clarify one point relating to the necessity test that is of importance here.

7.2[b] *Necessity: 'Less' or 'Least' Restrictive Test?*

Aside from ascertaining whether the measure at issue makes a contribution to the achievement of the avowed policy objective,[239] a panel also compares the measure with alternative measures.[240] There is some confusion as to whether necessity implies a *less* or *least* trade-restrictive test.[241] This is, however, only a formulation issue: A Member has to adopt the *least* trade-restrictive measure to achieve a particular public welfare objective, but the extent to which the Member wants to protect that objective is at the Member's discretion.[242] If there is a *less* restrictive alternative to achieve the same result, Members are under an obligation to use it.[243] When there is no *less* restrictive alternative available to achieve a particular goal, it means that the chosen measure is the *least* restrictive. In short, Members have to pursue their public welfare objectives in the most trade-friendly manner possible.

7.2[c] *Strict Proportionality*

An application of the principle of proportionality *stricto sensu* would amount to a de novo review of domestic prioritization decisions. This would override the weighing-up carried out by national legislatures, thus negating the precept that Members

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237 Case 174/82, *Sandoz* [1983] ECR 2445, para. 18; Case C-13/91 and C-113/91, *Debus* [1992] ECR I-3617, para. 16.

238 Thorsten Kingreen, *Art. 34–36 AEUV*, in *EUV/AEUV* para. 102 (Christian Calliess & Matthias Ruffert eds, 5th ed., C.H. Beck 2016).

239 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150.

240 It is for the complainant to propose alternative measures, Appellate Body Report, *EC – Seal Products*, para. 5.261.

241 Regan, *supra* n. 235, at 348 f, 366 ('less-restrictive alternative test'); Chad Bown & Joel Trachtman, *Brazil-Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 World Trade Rev. 85, 87 f (2009) ('least-trade-restrictive-alternative test'); Gebhard Bücheler, *Proportionality in Investor-State Arbitration* 71 (OUP 2015) ('least-restrictive means test').

242 Appellate Body Report, *EC – Asbestos*, para. 168; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210; Appellate Body Report, *EC – Seal Products*, para. 5.200. *See also* Arts 3.3, 4.1, 5.5, 5.6 SPS Agreement, recital 6 Preamble to the TBT Agreement.

243 Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

autonomously set the level of protection they aspire to.[244] Therefore, Regan is right in pointing out that 'these two pronouncements of the Appellate Body – that measures must be subjected to a balancing test and that Members get to choose their own level of protection – are logically contradictory'.[245] Reid argues that the Appellate Body in *US – Gasoline* examined whether 'the restriction was "disproportionate" in terms of the costs imposed, when applying the chapeau'.[246] In truth, the Appellate Body criticized the respondent for not taking the cost effects of the measure on foreigners into account.[247]

To the author's mind, WTO adjudicating bodies applying a strict proportionality test would exceed the limits of their institutional competence. National legislatures are better equipped to perform the complex reconciliation of competing societal values and interests.[248] Howse and Langille observed with respect to the public morals exception that:

> there is nothing in the text of Article XX(a) that requires, for the invocation of the public morals exception, that the moral beliefs or values at issue be of such a priority that they trump all other moral beliefs, values, or social interests. This would render regulatory schemes that balance or harmonize some beliefs or values with other beliefs or values indefensible in light of their supposed objective to protect public morals.[249]

This statement can be generalized for the other grounds of justification. In conclusion, there is, and there should be, no balancing of interests under the chapeau. What is more, *in dubio pro libertate* is not a principle that would guide the interpretation of the exceptions.[250] In this regard, the Members are left with a margin of appreciation. The chapeau does not embody a strict proportionality test.

8 REWORKING THE CHAPEAU

The ambiguities of the chapeau, if falsely interpreted, could lead adjudicatory bodies to seriously encroach on the Members' regulatory autonomy, thus amplifying the tension that exists between international lawmaking and democratic processes at the national level. This danger is particularly acute in the context of investor-state dispute settlement where chapeau language is used in international investment agreements. For the danger not to materialize, the chapeau has to be construed

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244 Andenas & Zleptnig, *supra* n. 234, at 390.
245 Regan, *supra* n. 235, at 348.
246 Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* 247 (Hart 2015).
247 Appellate Body Report, *US – Gasoline*, at 28.
248 Ioannidis, *supra* n. 84, at 1202; Henckels, *supra* n. 226, at 250–252; Howse & Langille, *supra* n. 217, at 428. For the dangers associated with proportionality in general, *see* Bücheler, *supra* n. 241, at 62–66.
249 Howse & Langille, *supra* n. 217, at 418.
250 Appellate Body Report, *US – Gasoline*, at 18; Appellate Body Report, *EC – Hormones*, para. 104.

narrowly; above all, a strict proportionality test must be ruled out. Ultimately, this concentration of the chapeau will be conducive to the legitimacy of the world trading system, for a lower bar guarantees domestic legislatures more latitude.[251] As postulated by Davies, 'For a measure already found to be necessary to be subject to further review under the chapeau is perhaps indicative of an ordering of values in favour of trade, which is obviously now anachronistic.'[252]

Against this, Morgan cautions that discarding the chapeau would result in 'uncertainty that would surround measures previously found incompatible with the chapeau'.[253] The most radical reading of the chapeau would be a reading akin to paragraph 1 of Article III GATT, namely as a general principle informing the rest of the exception, 'as a guide to understanding and interpreting' the subparagraphs.[254] As a corollary, the chapeau would be elaborated by the specific grounds of justification but have no direct application. Then again, for Wells, the chapeau constitutes 'a suitable gatekeeper'.[255] Rather than discarding it, the language of the chapeau should be reworked and, where possible, simplified with a view to clarifying its meaning. The 'perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT' mooted by the Appellate Body in *EC – Seal Products* does not only concern the grounds of justification but also the chapeau.[256] It is unlikely that the Members will amend the WTO Agreement, as hinted at by the Appellate Body in that case. This should not cause negotiators of FTAs, however, to perpetuate that 'perceived imbalance'. On other occasions, too, they clarified the WTO exceptions they incorporated. For instance, Article 28.3.1 CETA stipulates that Article XX(b) GATT includes environmental measures and Article XX(g) includes living resources. The same is true of the CPTPP.[257]

Other agreements have adopted different formulations of the chapeau. For instance, Turkey uses a shortened version of the chapeau for general exceptions in some of its BITs ('Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures').[258] The Canada–Korea FTA omits the 'arbitrary or unjustified

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251 *See also* Ioannidis, *supra* n. 84, at 1199.

252 Davies, *supra* n. 42, at 538.

253 Moran, *supra* n. 11, at 13.

254 Cf. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 Nov. 1996, at 18.

255 Philip Joseph Wells, *Unilateralism and Protectionism in the World Trade Organization: The Interpretation of the Chapeau within GATT Article XX*, 13 J.I.T.L.P. 222, 228 (2014).

256 Appellate Body Report, *EC – Seal Products*, para. 5.129.

257 Art. 29.1.2 TPP.

258 Art. 5(1) of the Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Azerbaijan on the Reciprocal Protection and Promotion of Investments (entered into force 2 May 2013); Art. 5(1) of the Agreement Between the Government of the Republic of Turkey and the Government of the Gabonese Republic Concerning the Reciprocal Promotion and Protection of Investments (signed 18 Jul. 2012); Art. 5(1) of the Agreement Between the Government

discrimination' language in its chapter on the environment and only speaks of 'a disguised restriction on trade or investment between the Parties'.[259]

9 CONCLUSIONS

The way to address non-trade concerns at the WTO, or any other trading regime for that matter, is to ensure policy space for national lawmakers. General exception clauses are pivotal to this. It is the place where the Appellate Body ultimately draws the line between where the international trade obligation ends and the national policy space begins. Hence governments should be clear about their requirements. It is fair to say that, of all the requirements found in exception clauses, the chapeau is the vaguest, and therefore the most problematic one. On the upside, the chapeau has the potential to induce Members to comply with good governance standards. At the same time, it reinforces a global consensus about good governance in the form of good administration.

In the author's view, the chapeau constitutes a good faith caveat foreclosing arbitrary rule-making, not a stringent threshold requirement. We found that an arbitrariness test is at the heart of the chapeau analysis. Further, the way international trade and investment law handle the concept of arbitrariness is alike, even the argument is couched in a similar way. The expression 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' should be examined as a whole and the focus should be on arbitrariness as set out above. This means that the elements 'unjustifiable' and 'between countries where the same conditions prevail' can be scrapped, as the instances falling thereunder can be subsumed under the arbitrariness test. Examples include the shortfall in technical assistance and shorter phase-in periods as compared to other trading partners from *US – Shrimp*.[260] This would align the chapeau with Article 36, second sentence, TFEU, which read as follows: 'Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.' Because 'restriction' is the broader concept and encompasses 'discrimination', the latter could be omitted altogether. This would lead to the following introductory clause:

> Subject to the requirement that such measures do not constitute an arbitrary or disguised restriction on trade [or investment] between the Parties, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures …

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of the Republic of Turkey and the Government of the Republic of The Gambia Concerning the Reciprocal Promotion and Protection of Investments (signed 12 Mar. 2013).

259 Art. 17.1.3 of the Free Trade Agreement Between Canada and the Republic of Korea (entered into force 1 Jan. 2015).

260 Appellate Body Report, *US – Shrimp*, paras 174 f.

This would not amount to a complete redrafting of the chapeau, but rather a more precise restatement.

To sum up, the Appellate Body sought to come to grips with the chapeau by confining its scope to the administration of the measure at issue. However, because the Appellate Body scrutinizes substantive exceptions to the measure under the chapeau, the distinction between substance and administration of the measure became blurred. The article presented two alternative approaches to rein in the chapeau: Firstly, the burden of proof under the chapeau could be redistributed and lessons could be learnt from the necessity test in this regard. Secondly, negotiators could simplify the WTO language for purposes of FTAs and BITs. Negotiators could even go one step further and codify accepted grounds of arbitrariness, such as having no due regard to facts or foreign interests, in the form of legislative examples. This would provide treaty interpreters with additional guidance.